Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1998

No.

EDWARD BOJEKIAN and FLORENCE BOJEKIAN

Petitioners

v.

FORT LEE PLANNING BOARD; MAYOR AND COUNCIL OF THE BOROUGH OF FORT LEE; EAST/WEST VENTURE, A Partnership of the State of New York

Respondents

Petition For A Writ of Certiorari To The Supreme Court of New Jersey

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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4/98

QUESTIONS PRESENTED

1. Should the escarpment of the Palisades Cliffs--one of the tri-state region's most precious natural features--be destroyed by a structural tower constructed at the base of the rock face, without access to the courts and an opportunity on the part of New Jersey residents whose properties on the cliffs are specially injured, to challenge the rezoning amendments required by Fort Lee's settlement agreement with a private developer?

2. By refusing access to the state courts to hear a property owner's complaint challenging a land use settlement, did the state courts unconstitutionally violate and deny plaintiffs' rights to defend their property and to secure due process of law under the Fifth and Fourteenth Amendments?

3. In promising a high-rise

developer that it would rezone plaintiffs' low-rise residential district, did the local zoning officials, by prejudgment, convert the land use hearing process into a charade, in violation of the Fourteenth Amendment's guaranty of an opportunity to be heard in defense of property rights?

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Edward Bojekian and Florence Bojekian, his wife, pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of New Jersey filed in this action on September 24, 1998.

OPINION BELOW

The Bojekians filed a complaint (to protect the value of their home on the Palisades cliffs from zoning damage due to defendants' high-rise construction) on April 25, 1994, in the Superior Court of New Jersey under Docket No. L-3983-94. The trial judge immediately, on May 27, 1994, ordered that their action could not proceed and that

> "the Court will not hear . . . [their] case, prerogative writ, captioned in any other fashion, any other motion . . . ."

It permitted the Bojekians to be objectors in a related affordable housing case, known as the East/West litigation, pending in the same court. Both the dismissed case and the East/West case were heard and decided in an interlocutory opinion of the Superior Court of New Jersey, Appellate Division, decided January 5, 1996, reported at 286 N.J. Super. 311, 669 A.2d 260 (App.Div. 1996).

As to the Bojekians, the Appellate Division ruled:

> "It would therefore be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds."

The 1996 opinion was a final judgment with respect to all issues covered by a Settlement Agreement for an affordable housing project, but was a partial judgment approving the affordable housing settlement. In February, 1996, the Bojekians moved in the trial court to be heard on the zoning and planning issues under an amended complaint challenging the municipality's master plan and zoning amendments. The trial court denied the motion for leave to file an amended complaint and to reinstate the 1994 action, and the Bojekians filed a second appeal to the Superior Court of New Jersey, Appellate Division in 1998. The court noted that it had earlier held in

its first opinion in 1996 that

> "any person or entity who did or did not attend the 'fairness' hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective."

It nevertheless, in an unreported opinion dated April 7, 1998, held that its earlier ruling "cannot fairly be read as intending to grant the Bojekians the right to file a challenge to the amended ordinance which had been adopted sixteen months earlier." Its 1998 opinion left standing the 1994 dismissal and resulted in the denial of access to any court by the Bojekians in their attempt to preserve the value of their home from the zoning damage, estimated at $162,072 (43% of the fair value of their $375,000 residence), from East/West's proposed luxury 538-unit, 42-story high-rise tower. An appeal by the Bojekians from the prior interlocutory rulings and from the Appellate Division's

1998 ruling was dismissed by a New Jersey Supreme Court order filed September 24, 1998.[1]

JURISDICTION

The judgment of the Supreme Court of New Jersey was filed on September 24, 1998. This Court's jurisdiction is invoked under 28 U.S.C., §1257, of the Judicial Code, authorizing review by this Court by writ of certiorari of cases decided in the highest state courts of appeal.[2]

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[1]The Appellate Division's 1996 opinion is reported at 286 N.J. Super. 311, 669 A.2d 260 (App.Div. 1996). Its 1998 opinion and the New Jersey Supreme Court's dismissal order appear in the Appendix hereto.

[2]Pursuant to R.14.1(b), the parties to the Superior Court action that the Bojekians attempted to pursue in 1994 included three defendants who remain in the case: The Fort Lee Planning Board; the Fort Lee Mayor and Council; and the developer, East/West Venture, a partnership. Two originally-named defendants, the County of Bergen and River Ridge Condominium Association, who were additional signatories to the Settlement Agreement challenged by the Bojekians, were precluded from participating in the 1998 appeal for failure to file briefs by Orders of the Appellate Division entered August 13, 1997.

Plaintiffs believe that, following the New Jersey Supreme Court's dismissal of the appeal in September, 1998, the developer, East/West Venture, a New York Partnership, transferred its development

CONSTITUTIONAL PROVISIONS INVOLVED

1. *U.S. Constitution,*

Amendment V. ". . .[N]or shall any person. . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. ". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. *N.J. Const., Art.I, ¶ 1,* provides:

"Natural and Unalienable Rights. 1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property . . . ."

3. *N.J. Const., Art.6, § 5, ¶ 4,* provides:

"Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the

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rights to The Palisades A/V Company, L.L.C. (hereinafter either "the Palisades Company," "the developer," or "East/West's successor.") Although the Palisades Company is not a party, service of this Petition will be made on its attorneys for the Fort Lee project.

Supreme Court, as of right, except in criminal causes where such review shall be discretionary." (Emphasis added)

STATUTORY PROVISIONS INVOLVED

1. *Municipal Land Use Law ("MLUL"), § 6(a), N.J.S.A. 40:55D-10(a)*, provides:

"The municipal agency shall hold a hearing on each application for development. . . ."

2. *MLUL, § 7.2, N.J.S.A. 40:55D-13*, provides:

"The Planning Board shall give: (1) public notice of a hearing on adoption, revision or amendment of the master plan. . . at least 10 days prior to the date of the hearing."

3. *MLUL, § 3.3, N.J.S.A. 40:55D-6*, defines the term "party immediately concerned" as follows:

"'Party immediately concerned' means for purposes of notice any applicant for development, the owners of the subject property and all owners of property and government agencies entitled to notice under section 7.1 (C.40:55D-12)."

STATEMENT OF THE CASE

Among New Jersey's most precious natural assets are the Palisades Cliffs bordering the Hudson River shoreline and the

magnificent views of the New York skyline of those living on and at the top of the Cliffs. In economic terms, the views of New York and of the lower Hudson River valley held by Fort Lee residents are a critical aspect of their property values. In petitioner's case, the view--i.e., the economic obsolescence resulting from its taking--has been appraised at 43% of the property's fair market value.

The Bojekian plaintiffs have owned and resided at a home in Fort Lee, at the top of the Palisades Cliffs, for over 44 years. When they learned in March, 1994, of a developer's plan to build a 538-unit, 42-story high-rise tower on an adjacent parcel, and of the municipality's upcoming consideration of a rezoning of their low-rise residential district to allow the tower to be built, under a Settlement Agreement between the developer and Fort Lee (of litigation to which they were not

parties), the Bojekians immediately filed suit, in April, 1994, to defend and protect their property value--before any rezoning, before any settlement agreement was signed and approved, and before Fort Lee's Planning Board adopted any master plan amendments for their neighborhood.

Filed immediately, before any rezoning or master plan amendments, plaintiffs' complaint was dismissed at the outset. Although an Appellate Division ruling was made in their favor in 1996 (that "fundamental fairness" required that Fort Lee residents have a hearing on the rezoning measures), New Jersey's state courts, including the same appellate panel that in 1996 mentioned "fundamental fairness," in later decisions have ruled that plaintiffs' complaint was properly dismissed upon its filing in 1994 and, indeed, that plaintiffs are time-barred from challenging the rezoning of the

adjacent parcel.

The Bojekians live in an older home, near the top of the Palisades Cliffs in Fort Lee, but it has a magnificent, nearly panoramic view of the New York skyline and of the lower Hudson River valley; their real estate appraisal expert valued the view at 43% of the fair value of their property, $375,000, and submitted an appraisal report that the zoning damage resulting from East/West's proposed luxury 42-story high-rise building, treated as "external obsolescence," amounted to "$375,000.00 x .43 = $162,072.00 rounded." The adjustment made by the expert for "view" in a comparable sales analysis of other Fort Lee properties with a river view was "about 10%," but the appraiser reported that other market studies "show this range to go as high as 50%." Using a "conservative" approach, the appraiser determined that "a middle compromise" at

43% was warranted, with the result that the value of plaintiffs' fee would drop from $375,000 to $213,000, if the view of the New York skyline and harbor from plaintiffs' house is blocked.[3],[4]

The dismissal of their April, 1994, complaint without trial or other due process was in violation of plaintiffs' property rights under the Fourteenth Amendment to the United States Constitution.

On an interlocutory appeal in 1996, the

---

[3]The appraisal proofs, if permitted to be heard, would include the expert's opinion that the subject's "future seemed assured in keeping with the neighborhood" but that "a hi-rise building, such as is being built, completely destroys the homogeneity of the neighborhood." In addition to losing the view, the plaintiffs' value damage results from the loss of light and air and from "being overshadowed by a hi-rise structure."

[4] It is undisputed that East/West's 42-story tower, accommodating 538 luxury condominium units (if built under Fort Lee's enabling rezoning measures), will be one of the largest structures built in northeastern New Jersey in terms of bulk and width. Of importance to the tri-state region, against the recommendations of the Regional Planning Association, the structure will be built at the base of the Palisades Cliffs, not merely at the top, thereby obscuring the face of the cliffs. The enormity of the construction is accentuated when it is considered that the tower of 30 stories will be constructed upon the top of a 12-story parking garage built at the base, but never completed, in 1972.

Appellate Division seemed to agree that the Bojekians had a constitutional right to be heard under the Due Process Clause.[5]

On remand in the related case, the Superior Court nevertheless went on to enter a Final Judgment of Compliance permitting the East/West project to proceed but without permitting the Bojekians or their appraisal and planning witnesses to be heard. Denial of access to the court was affirmed in 1998 when the Appellate Division ruled that the Bojekians would be left in the same position as "those who slumber on their rights;" i.e., precluded from being heard on the zoning and planning issues raised either in their original April, 1994 complaint or in their proposed

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[5]In 1996, the court stated:
"It would therefore be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds. . . ." 286 N.J. Super., at pp.331-33.

supplemental complaint.

On their further appeal to the New Jersey Supreme Court, the denial of access to the court on the theory that plaintiffs were merely "objectors" who were "time-barred" was dismissed for failing to raise a substantial constitutional issue.

The Bojekians attempted to raise the federal questions sought to be reviewed here at every stage in the proceedings, both in the court of first instance and in the appellate courts. When the East/West settlement agreement was approved at a joint high-school meeting of Fort Lee's zoning officials on March 9, 1994, plaintiffs filed a four-count complaint in the Superior Court of New Jersey, on April 25, 1994, alleging in paragraph 14 of their first count "that the proceedings taken on March 9 were unconstitutional and void in that they violated the Due Process Clause and Equal Protection Clause of the

Fifth and Fourteenth Amendments to the United States Constitution." Their first demand on the first count was for a judgment securing their rights "under the Fourteenth Amendment by invalidating the East/West agreement. . . adopted March 9, 1994."

Similarly, when the court refused to hear their complaint but said that they could file contentions as "objectors" in East/West's case, plaintiffs alleged in written objections filed May 31, 1994, that the proceedings taken on March 9 "were unconstitutional and void in that they violated. . . their rights to due process of law and equal protection of the law, including their right to notice, hearing, and an opportunity to defend and protect the value of their property, secured by the Fourteenth Amendment . . . ."

And, in opposing defendants' motion to

dismiss their separate case, plaintiffs submitted a certification to the trial judge on May 19, 1994, alleging prejudgment as follows:

> "To the extent that the settlement agreement prevents the exercise of the Bojekians' right to a public hearing by an unbiased tribunal, they seek a declaratory judgment that the contract between the defendants is unlawful and unconstitutional. The most objectionable provisions of the contract--which, it is alleged, is a contract to control the outcome of the required public hearings--are paragraphs B and C of Part II. These provide as follows:
>
> 'B. Master Plan Amendments - The Planning Board agrees to amend the Housing Element of the Master Plan so as to make it consistent with this Agreement and any Judgment flowing from this Agreement within 30 days of a ruling by the Superior Court approving this Settlement.
>
> C. The Implementing Ordinance - Fort Lee agrees to adopt, within 30 days. . . the attached ordinance. (Exhibit E).'"

Except for the reference to fundamental fairness and a right of Fort Lee residents to be heard on zoning and planning amendments in the Appellate Division's

1996 interlocutory opinion, 236 N.J. Super.311, 669 A.2d 260 (App.Div. 1996), New Jersey's trial and appellate courts either lost sight of or otherwise declined to deal with plaintiffs' constitutional claims.

REASONS FOR GRANTING THE WRIT

1. THE DISMISSAL AT THE OUTSET OF PLAINTIFFS' ACTION IN 1994 WAS IN VIOLATION OF THE RIGHT OF ACCESS TO THE COURT SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Bojekians did everything within their own power to defend the value of their property and to obtain a hearing or trial in the Superior Court on their timely-filed complaint. The radical and sudden turn taken by the Fort Lee zoning authorities--to enter into a settlement agreement committing the Borough to rezone--involved special injury to the petitioners and to numerous other persons in Fort Lee.

The rezoning and the replanning of

plaintiffs' district were prejudged by the promises to the developer made by the Borough in the East/West Settlement Agreement. Any failure to adopt the rezoning and master plan amendments and to change Fort Lee's long-standing land use plan would constitute a breach of contract by the Borough. It was plainly the case that the Borough had bargained away its power to zone and to plan and that the rezoning feared by the plaintiffs had been effectively accomplished by a contract with the developer, approved by the Superior Court itself.

In dismissing the suit upon its filing, the trial judge ruled:

> "If they are to have a voice, they have to have that voice on June 15 <u>as an objector</u> at the compliance hearing." (Emphasis added)

At the compliance hearing, the Bojekians

were denied the right of cross-examination of witnesses. Their subpoenas were quashed or modified. They were put in the position of being "an objector" to a project, as opposed to parties with access to the court.

This Court has entertained suits attacking local zoning ordinances on fourteenth amendment grounds. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962); Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); and Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Plaintiffs have satisfied the requirements of those cases by alleging that Fort Lee's rezoning measures are arbitrary, capricious and the result of prejudgment, and that plaintiffs are adversely and specially injured.

The summary refusal of courts to permit constitutional challenges to local zoning ordinances must be reversed; and the lower courts are without power to refuse access to persons whose constitutional rights have been violated. In Twp. of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968), plaintiff alleged in its complaint that its property had been and will be depreciated in value without due process of law. It claimed a violation of its constitutional rights, but the lower court entered a summary dismissal. In reversing and remanding, the Second Circuit ruled:

> "That allegation, although it could and should have been made more explicit. . .is adequate to invoke the due process clause of the fourteenth amendment." 403 F.2d, at 685.

Abrogation of constitutionally protected rights of property may amount to a taking.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), this Court

held that if a state law were applied to the case, the statute would be "admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. . . ." None of the grounds for refusal to permit plaintiffs' challenge to the rezoning of their district reflects "a public interest sufficient to warrant so extensive a destruction of the [petitioners'] constitutionally protected rights." 43 S.Ct., at p.159. It is settled that the Fourteenth Amendment expresses a limitation against the actions of "public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Hurtado v. California, 110 U.S. 516, 4 S.Ct. 11, 121 (1884).

In Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953), New Jersey's highest court viewed zoning suits initiated by

private citizens more sympathetically, recognizing that:

> "[Plaintiffs'] proceeding . . .serves not only his private interests but those of the entire community as well. . . ." 11 N.J., at 305.

Garrou also dealt with a property owner whose home adjoined the subject premises and who alleged "special damages in that he and his family are being discommoded and his property depreciated." Id., at 300. The Supreme Court held that the dismissal was improper, ruling:

> "It may very well be that at the close of the entire case, the trial court. . .will deny the relief sought against the defendant municipal officials. . . .But, be that as it may, the showing at the end of his case was sufficient to withstand the motion to dismiss grounded on the alleged absolute unavailability of any proceeding in lieu of prerogative writ to compel enforcement of the ordinance." Id., at 304.

For a period of four years, from 1994 to 1998, the Bojekians made every effort to be heard in an exercise of their constitutional right to defend the value

of their property and to uphold the long-standing master plan and land use plans for their area. Nonetheless, the New Jersey courts have refused to permit them to be parties to an action and have now ruled that their case does not involve "a substantial question" arising under the Constitution.

II. A BINDING PROMISE TO ADOPT LOCAL ZONING AND LAND USE AMENDMENTS, MADE IN ADVANCE OF PUBLIC HEARING, IS AN UNCONSTITUTIONAL PREJUDGMENT, IN VIOLATION OF EQUAL PROTECTION AND REMEDIABLE UNDER THE FOURTEENTH AMENDMENT.

Plaintiffs attempted to urge that the settlement agreement between the Borough and the East/West partnership represented illegal contract zoning. The most offensive provision is ¶II(B), providing as follows:

> "B. Master Plan Amendments - The Planning Board agrees to amend the Housing Element of the Master Plan so as to make it consistent with this Agreement. . . ."

This provision resulted in a prejudgment

of the land use issues raised by plaintiffs' complaint. New Jersey's Municipal Land Use Law ("MLUL") provides:

> "The municipal agency shall hold a hearing on each application for development. . . ." MLUL, § 6(a), N.J.S.A. 40:55D-10(a).

It needs no extensive argument that municipal zoning officials may not prejudge either an application for development or zoning and master plan amendments. To do so makes the public hearing a charade.

Due process requires that a litigant be allowed to make an "impressionable contact with the powers of decision." Fifth St.Pier Corp. v. City of Hoboken, 22 N.J. 326 (1956). Any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause. Montville Tp. v. Block 69, Lot 10, 74 N.J. 1 (1977). It was early recognized in Hyman v. Muller, 1 N.J. 124 (1948), that the essential elements of due

process of law as guaranteed by the Fourteenth Amendment of the United States Constitution are:

> "Appropriate notice of the judicial action and adequate opportunity to be heard. . . Procedural due process contemplates a trial according to some settled course of judicial proceedings. . . Due process in judicial proceedings implies action in conformity with the general law, based upon evidence, and after a full hearing upon notice to the parties affected and opportunity to be heard. Judgment without. . .opportunity to be heard lacks the very attributes of a judicial determination. . . ." Id., at 129.

MLUL, § 3.3, N.J.S.A. 40:55D-6, defines the term "party immediately concerned" as follows:

> "'Party immediately concerned' means for purposes of notice any applicant for development, the owners of the subject property and all owners of property [within 200 feet]."

To conclude: A private settlement contract with a developer that robs a citizen of the ability to make an "impressionable contact with the powers of decision" at a public hearing at the

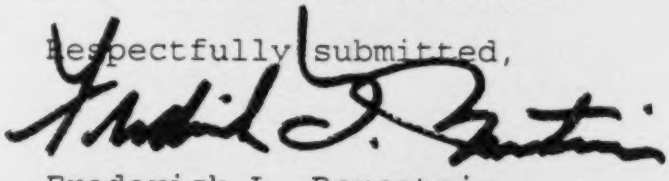
municipal level--that commits the municipal zoning authorities to adopt a specified land use plan in advance of notice to the interested parties and hearing--is ultra vires the authority granted to municipal bodies in MLUL and in violation of both the state and federal Bill of Rights. Before defendants' 538-unit luxury tower is constructed and the face of the Palisades is blocked, plaintiffs have, as initially recognized in this case in 1996, the constitutional right to be heard, as a matter of fundamental fairness, on the zoning and planning harms both to them and to the public. The stifling of any dissent to the East/West project involves a great potential of harm to the public interest and, insofar as the plaintiffs are concerned, denies them the right to be heard in violation of the rights of access guaranteed by the United States

Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the refusal of the state courts of New Jersey to hear and decide plaintiffs' challenge to the rezoning of their residential district.

Respectfully submitted,



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF NEW JERSEY
M-22 September Term 1998
46,140

FILED September 24 1998
Stephen W. Townsend, Clerk

EDWARD BOJEKIAN, et al,
Plaintiffs-Respondents

v.

FORT LEE PLANNING BOARD, et al,
Defendants

and

EAST/WEST VENTURE,
Defendant-Movant

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal is granted for failure to state a substantial constitutional question under Rule 2:2-1(a)(1).

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of September, 1998.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3359-96T5

FILING DATE
APPELLATE DIVISION
APRIL 7, 1998

EDWARD BOJEKIAN and FLORENCE BOJEKIAN,

Plaintiffs-Appellants

v.

FORT LEE PLANNING BOARD, MAYOR AND COUNCIL OF THE BOROUGH OF FORT LEE, EAST/WEST VENTURE, a Partnership of the State of New York, THE COUNTY OF BERGEN and RIVER RIDGE CONDOMINIUM ASSOCIATION

Defendants-Respondents

Argued February 23, 1998 -
Decided April 7, 1998

Before Judges Havey and Newman

On appeal from Superior Court of New Jersey, Law Division, Bergen County

Frederick L. Bernstein argued the cause for appellants (Mr. Bernstein, on the brief)

Frederic S. Kessler argued the cause for respondents Mayor and Council of the Borough of Fort Lee and Fort Lee Planning Board (Tompkins, McGuire & Wachenfeld and Mark K. Follender, attorneys; Mr. Kessler and Mr. Follender, of counsel and on the joint brief)

Henry A. Hill argued the cause for respondent East/West Venture (Hill Wallack, attorneys; Stephen Eisdorfer, on the brief)

Respondents County of Bergen and River Ridge Condominium Association did not file briefs.

In this Mount Laurel[6] litigation, plaintiffs Edward and Florence Bojekian appeal from an April 15, 1996 order denying their motion to reinstate a previously dismissed prerogative writs complaint and to file a supplemental complaint. We affirm.

In East/West Venture v. Borough of Fort Lee. 286 N.J. Super. 311 (App. Div. 1996),

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[6]Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S.Ct. 18, 46 L.ed. 2d 28 (1975) (Mount Laurel I); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II).

we affirmed as modified an order entered in the Law Division approving a partial settlement of Mount Laurel builder's remedy litigation between plaintiff East/West Venture and defendants Borough of Fort Lee, its Planning Board and the County of Bergen. The proposed agreement had three key components: (1) it allowed East/West to construct a thirty-story, 538-unit condominium complex on a 4.88 acre tract of land; (2) East/West would construct a sixty-unit affordable housing development; and (3) East/West would contribute $800,000 to Fort Lee's Housing Trust Fund to assist the Borough in meeting its fair share obligation. Id. at 320. The agreement represented a substantial component of Fort Lee's compliance plan, designed to meet the Borough's constitutionally imposed fair share obligation to provide 140 low- and moderate-income housing units. Id. at

319.

The settlement was the culmination of Mount Laurel litigation that was instituted in 1988 by East/West challenging Fort Lee's zoning regulations as violative of the Mount Laurel doctrine. Id. at 320. After a series of hearings before the Fort Lee Township Committee, its Planning Board and Bergen County, a written settlement agreement was executed on March 21, 1994. Ibid. Edgewater Township intervened. Ibid. The Bojekians filed their own prerogative writs action challenging the proposed settlement. Ibid. Judge Ciolino consolidated the Bojekians' complaint with East/West's complaint. Ibid.

A "fairness" hearing concerning the proposed settlement was conducted before Judge Ciolino in the Law Division over five days in June 1994. Id. at 321. Substantial testimony was taken concerning

the terms of the settlement. Various issues concerning land use considerations were raised and addressed. Several objectors, including Edgewater and the Bojekians, appeared and presented expert witnesses who testified in opposition to the proposal. Id. at 321, 323. In a written opinion, Judge Ciolino approved the settlement agreement. Id. at 323. He adopted the testimony of Philip B. Caton, the master appointed by Judge Skillman in 1989, id. at 320, and determined that the agreement "represents sound land use planning and is in compliance with [Council on Affordable Housing] regulations." Id. at 323. The judge also concluded that the settlement, including the provision for sixty affordable units and the $800,000 contribution to Fort Lee's Mount Laurel fund, "constituted a fair and reasonable partial settlement of Fort Lee's compliance obligation. . . ."

Ibid.

Edgewater appealed, arguing that: (1) the settlement agreement constituted "contract zoning"; (2) the settlement did not provide sufficient Mount Laurel units to satisfy the minimum standards set forth by Mount Laurel II; (3) specific provisions of the agreement were ultra vires because they conflict with the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -136; and (4) the agreement violated sound planning concepts and the purposes of zoning under the MLUL. East/West Venture, supra, 286 N.J. Super. at 319. The Bojekians joined in Edgewater's contentions, but also argued that the trial judge erred in treating them as objectors to the settlement agreement rather than deciding their prerogative writs action separately. They also claimed that the agreement was invalid because East/West's proposed

market-rate complex would be constructed on a lot that had never been legally divided. Ibid.

In our prior opinion, we affirmed the order approving the settlement to the extent that we determined that it was "fair" in the sense that it protected the interests of lower-income people on whose behalf the suit was brought. Id. at 326-27, 334-36. We also rejected the contentions raised by the Bojekians, concluding that they were clearly without merit, id. at 341, except to preserve their claim that the subject property had not been properly subdivided. Ibid.

Pertinent to the Bojekians' present appeal is our discussion in our prior opinion concerning Judge Ciolino's holding that the zoning amendments adopted or to be adopted by Fort Lee to effectuate the settlement were sustainable as consistent with sound land use principles. We held,

as a general proposition, that:

> absent an amendment to R.4:69 to the contrary, see supra, n.3, the judge should not adjudicate the zoning and planning issues implicated by the agreement. Upon a finding that the agreement is "fair," the judge, without entering judgment, should first determine whether any of the provisions of the settlement are ultra vires or otherwise invalid. He or she should then remand for appropriate amendments to the master plan and zoning ordinance necessary to implement the agreement. This procedure will assure compliance with pertinent statutory safeguards. See e.g., N.J.S.A. 40:49-2; N.J.S.A. 40:49-2.1; N.J.S.A. 40:55D-13 to -16; N.J.S.A. 40:55D-26, -28 and -62.
>
> [Id. at 328.]

We further held, in the context of this particular "fairness" hearing, that:

> any person or entity who did or did not attend the "fairness" hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective.
>
> [Id. at 330.]

On October 27, 1994, during the pendency of the prior appeal, Fort Lee had in fact already amended its zoning ordinance to

effectuate the proposed settlement agreement. Edgewater filed a separate timely prerogative writs action challenging that amended ordinance. On June 19, 1995, the Planning Board adopted an amendment to the master plan consistent with the settlement agreement. Action Motors, Inc., another objector, filed a prerogative writs action challenging both the master plan amendment and previously-adopted amended ordinance. The Bojekians did not file a complaint challenging either action.

Our prior opinion in East/West was filed on January 5, 1996. On February 22, 1996, the Bojekians filed a motion to reinstate their prior prerogative writs complaint and to supplement the complaint raising substantive and procedural challenges to the October 27, 1994 amended ordinance.

Judge Ciolino denied the Bojekians' motion, concluding that the contentions

raised in the prior complaint had been adjudicated by us in our opinion and that the supplemental complaint was time-barred under R.4:69-6(b)(3).

The Bojekians' argument in their present appeal is that our opinion granted to them and all other interested parties the right to challenge the October 27, 1994 amendment to Fort Lee's zoning ordinance on substantive and procedural grounds. We disagree.

The thrust of our prior opinion was to define, in general terms, the parameters of a "fairness" hearing in approving settlement agreements reached in Mount Laurel litigation. Our focus was to clarify the issues to be considered and decided by the judge in such a hearing, underscoring that generally, when amendments to the zoning ordinance or quasi-judicial action by local zoning and planning boards is necessary to effectuate

the settlement, the matter should be remanded to the appropriate local body for action before a final order approving the settlement is entered. See also Warner Co. v. Sutton. 274 N.J.Super. 464 (App. Div. 1994).

It is true, as stated, we observed that "any person or entity who did or did not attend the 'fairness' hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective." East/West Venture, supra, 286 N.J. Super. at 330. However, this observation was merely intended to highlight the fact that the findings made by the judge concerning the zoning issues were not binding on the objectors, with the exception of Edgewater. The observation cannot fairly be read as intending to grant the Bojekians the right

to file a challenge to the amended ordinance which had been adopted sixteen months earlier. Notably, during the prior appeal, all the parties knew that Fort Lee had amended its ordinance on October 27, 1994. The issue concerning whether the Bojekians were barred from challenging that legislative action by the Borough was not raised before us. Therefore, we did not address the question.

It is also true that we observed that "[i]t would be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds." Id. at 331-32. When we filed our prior opinion, it was entirely unclear to us what additional procedural steps were necessary to be taken by the Borough or its Planning and Zoning Boards in order to effectuate the settlement agreement. Although we had

been advised that the amended zoning ordinance had been adopted, we did not know whether additional bulk variances, site plan or subdivision approvals were necessary. We did not know whether in fact the Planning Board had amended its master plan and land use element. Consequently, our focus was on preserving the objectors' right to challenge "subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds." Id. at 332 (emphasis added). It was not our intention to resurrect the Bojekians' right to challenge the amended ordinance when they failed to do so in a timely fashion after its October 27, 1994 passage. Judge Ciolino recognized that the Bojekians and their attorney were charged with notice of the passage of the amended ordinance and, because they failed to challenge it, they were time-barred

under R.4:69-6(b)(3).

The judge also properly rejected the Bojekians' argument to relax the time limitation under R.4:69-6(c) in the "interest of justice." The forty-five day rule is "aimed at those who slumber on their rights," Schack v. Trimble, 28 N.J. 40, 49 (1958), and is designed to provide a measure of repose to both governmental agencies and developers. Reilly v. Brice, 109 N.J. 555, 559 (1988); Adams v. DelMonte, A-2740-96T2, slip op. at 7 (N.J. App. Div. 1998); Washington Tp. Zoning Bd. of Adjust. v. Washington Tp. Planning Bd., 217 N.J. Super. 215, 225 (App.Div.), certif. denied, 108 N.J. 218 (1987). Edgewater filed a timely complaint challenging the amended ordinance. Action Motors also filed a prerogative writs complaint challenging the amended ordinance and the subsequent amendment to the master plan. Notably, Action Motors,

Inc. was represented by the attorney who also represents the Bojekians. No persuasive reason is advanced why the Bojekians did not join Edgewater and Action Motors, Inc. in filing a complaint in a timely manner.

Of equal importance is that this Mount Laurel litigation has been pending since 1988. The issues have been thoroughly analyzed by the court-appointed Mount Laurel master. A substantial "fairness" hearing was conducted. We also cannot ignore the fact that central to this litigation is the provision of affordable housing for the poor. In such circumstances, we are entirely satisfied that Judge Ciolino's denial of the Bojekians' application to file a new complaint challenging the October 27, 1994 amended ordinance was a sound exercise of judicial discretion.

Affirmed.